

JULIET MARSH BROWN

IBLA 81-481

Decided June 17, 1982

Appeal from order to remove improvements issued by the Rawlins, Wyoming, District Office, Bureau of Land Management, implementing trespass notice WY-033-5-146.

Set aside and remanded.

1. Trespass: Generally

A notice to cease trespass and an order to remove improvements from public lands may properly issue where appellant has been occupying public lands without authorization or claim or color of title.

2. Special Use Permits -- Trespass: Generally

A notice to cease trespass and order to remove improvements may be set aside to allow consideration of a special use permit with appropriate restrictions where appellant concedes lack of right to the land and it is not clear that a temporary use authorization would interfere with any immediate need of the land for public purposes.

APPEARANCES: Juliet Marsh Brown, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Juliet Marsh Brown has appealed from adverse actions of the Rawlins, Wyoming, District Office, Bureau of Land Management (BLM), regarding unauthorized occupancy of the public lands. BLM issued a trespass notice (WY-033-5-146) dated September 5, 1980, and a notice dated November 26, 1980, to remove unauthorized improvements with respect to the SW 1/4 NW 1/4 sec. 13, T. 14 N., R. 84 W., sixth principal meridian, Wyoming.

The trespass notice of September 5, 1980, issued in response to Brown's request to lease the lands in question, notified appellant that she was maintaining a residence on Federal lands without authorization

in violation of section 1 of the Act of February 25, 1885, 43 U.S.C. § 1061 (1976), and the regulations at 43 CFR 9239.2. The District Office indicated in the trespass notice that Brown was allowed 250 days from receipt of the notice to cease the trespass.

Appellant responded by letter of September 10, 1980, enclosing a copy of a July 24, 1920, letter from the General Land Office, Department of the Interior, to appellant's predecessor in interest which indicated that land withdrawn for power purposes may, under some circumstances, be entered. Appellant contended this letter authorized entry on the land by her predecessor, R. K. Marsh. Upon receipt of appellant's submission, BLM requested the opinion of the Regional Solicitor with respect to the authority of appellant to assert a claim to the subject tract. The Regional Solicitor's opinion stated that no entry could be allowed until two conditions had been met: a determination by the Federal Power Commission (now Federal Energy Regulatory Commission) that the value of the land for power development would not be injured by entry under the public land laws and a declaration by the Secretary of the Interior that such lands are open to entry. In the absence of such an opening to entry, the Regional Solicitor asserted that there could be no legal entry on the land. Subsequently, the notice to remove improvements was issued to appellant which precipitated this appeal.

The record indicates that appellant's father, R. K. Marsh, constructed a cabin on the lands in question about 1920. In response to his inquiry in that year, Mr. Marsh was advised by letter from the General Land Office, Department of the Interior, dated July 24, 1920 (referred to above), that pursuant to an Executive order of December 28, 1910, the lands in question had been withdrawn and included in Power Site Reserve No. 169. <sup>1/</sup>

In a 1936 letter to the Cheyenne, Wyoming, land office of the Department, R. K. Marsh acknowledged the unauthorized nature of his occupancy, referring to his status on the land as that of a "squatter." In response, the land office confirmed that the land was withdrawn from entry. In response to an application filed by George Alex Brown, appellant's husband, the Federal Power Commission held in a February 27, 1959, decision pursuant to section 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1976), that the value of the W 1/2 NW 1/4 of sec. 13 for powersite purposes would not be materially injured by restoration to entry. The decision specifically advised applicant that the land remained in a withdrawn status until such time as BLM might issue an order of restoration. By letter dated June 11, 1962, Mr. Brown was advised by BLM that the land would not be open for filing of applications when, and if, it were restored, because it had been classified for recreational and public purposes and was being considered for a public campground.

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<sup>1/</sup> It appears from documents provided by appellant that R. K. Marsh originally believed that the cabin was located on the W 1/2 NE 1/4 NW 1/4 sec. 13. Both his 1920 inquiry and the Government land office response were directed to the status of this tract. A 1958 map submitted by appellant shows the cabin to be in the S 1/2 SW 1/4 NW 1/4 of the section and subsequent communications dealt with this tract. However, the master title plat and the historical index in the file indicate this land also was embraced in the powersite withdrawal.

Appellant has been cited for trespass for her maintenance of improvements on public land in violation of 43 CFR 9239.2-1, which provides in pertinent part:

§ 9239.2-1 Enclosures of public lands in specified cases declared unlawful.

(a) Section 1 of the act of February 25, 1885 (23 Stat. 321; 43 U.S.C. 1061), declares any enclosure of public lands made or maintained by any party, association, or corporation who "had no claim or color of title made or acquired in good faith, or an asserted right thereto, by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such enclosure was or shall be made" to be unlawful and prohibits the maintenance or erection thereof.

Section 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1976), provides in part that when the Commission determines that the value of any lands classified as a powersite will not be injured or destroyed for purposes of power development by location, entry, or selection under the public land laws the Secretary of the Interior "shall" declare such lands open to entry. This has been held to require revocation of the powersite withdrawal within a reasonable period, at least as to land in Alaska. However, the court recognized that the Secretary's power to withdraw the land to preserve other public values is a different issue. Reeves v. Andrus, 465 F. Supp. 1065, 1069-70 (D. Alaska 1979). Public lands within the contiguous western states including Wyoming have been withdrawn since Exec. Order No. 6910 (Nov. 26, 1934), from settlement and occupancy until they have been "classified and opened to entry." 43 U.S.C. § 315f (1976); James E. Billings, 38 IBLA 353 (1978).

Appellant admits her occupancy of the land. From our review of the record, we conclude that BLM correctly determined that appellant was in trespass. Appellant has provided nothing on appeal to persuade us that the occupancy of appellant and her predecessor was authorized or pursuant to claim or color of title or that BLM's decision is contrary to its policy towards trespassers on public lands. 2/

In her supplemental statement of reasons on appeal, appellant has recognized the intent of BLM to designate the land occupied by appellant for public recreational use, but points out that it is uncertain when the land will actually be devoted to such use. Appellant claims to understand that her private occupancy would be unacceptable when the public use is developed.

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2/ Appellant has alleged discriminatory treatment in that members of a fraternal organization have built about 30 cabins since 1930 on an adjacent 80-acre tract. However, the record indicates that the land in question was patented Oct. 17, 1930, pursuant to the Recreation and Public Purposes Act of June 14, 1926, ch. 578, 44 Stat. 741 (current version at 43 U.S.C. §§ 869 through 869-4 (1976)), to the town of Encampment which apparently subsequently authorized use of the land by the fraternal organization.

She expresses a willingness to accept an interim occupancy until such time. Special use permits issued under the general authority of the Secretary of the Interior to regulate use of the public land, pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1976), may be considered where other statutory forms of use or occupancy of the public lands are inapplicable. See 43 CFR Subpart 2920. Applications for special use permits may be rejected in the exercise of the Secretary's discretion where the proposed use conflicts with BLM objectives, responsibilities, or programs for management of the public lands involved. Cascade Motorcycle Club, 56 IBLA 134 (1981).

[1, 2] A notice to cease trespass and an order to remove improvements from the public lands are appropriate where a person has been occupying public lands without proper authorization. James E. Billings, supra. However, such a decision may be set aside to allow consideration by BLM of authorization of the use by special use permit subject to appropriate restrictions where the record does not establish that such limited authorization would interfere with immediate (as opposed to long term) BLM need of the land for public purposes. In light of the willingness expressed by appellant to accept an interest less than title to the subject land and the lack of indication in the record that such use would hamper BLM short term plans for the land, we find it appropriate to set aside the decision and remand the case to allow consideration of issuance of a special use permit with appropriate restrictions. If on remand of the case appellant fails to make application for special use permit or BLM determines by decision in response to an application for such permit that such authorization may not be granted for reasons supported by the record, then the trespass proceedings may be reinstated.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded for further proceedings consistent with this decision.

C. Randall Grant, Jr.  
Administrative Judge

We concur:

Bruce R. Harris  
Administrative Judge

Anne Poindexter Lewis  
Administrative Judge

